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AFS-FISHER PHILLIPS EMPLOYMENT LAW UPDATE

January 2023

OSHA Penalties Automatically Increase, Putting Pressure on Employers to Comply with Workplace Safety Obligations

The U.S. Department of Labor has just published its yearly increases to the maximum civil penalties that may be assessed via citations against employers by the Occupational Safety and Health Administration (OSHA) as a result of workplace safety and health inspections. These penalties will apply to all citations issued by OSHA beginning January 16, including for employers who currently have an open inspection with OSHA.

Summary of Penalties

The following is a summary of the maximum and minimum penalties that may be assessed by OSHA as of January 16:

Serious Violations

- Penalty minimum: $1,116 per violation
- Penalty maximum: $15,625 per violation

Other-Than-Serious Violations

- Penalty minimum: $0
- Penalty maximum: $15,625 per violation

Willful or Repeated Violations

- Penalty minimum: $11,162 per violation (except that for a repeated other-than-serious violation that otherwise would have no initial penalty, a Gravity Based Penalty of $446 shall be proposed for the first repeated violation, $1,116 for the second repeated violation, and $2,232 for a third repetition)
- Penalty maximum: $156,259 per violation

Violation of Posting Requirements

- Penalty minimum: $0
- Penalty maximum: $15,625 per violation

Failure-to-Abate Violations

- Penalty minimum: N/A
- Penalty maximum: $15,625 per day unabated beyond the abatement date (generally limited to 30 days maximum)

Again, these penalties will apply to all citations issued by OSHA beginning January 16, 2023, including for employers who currently have an open inspection with OSHA.

You can count on OSHA continuing to increase civil penalties in January of each year. In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to adjust monetary penalties assessed by OSHA and other agencies. The aim of this law was to adjust these penalties for inflation and to continue to deter violations of federal laws intended to protect workers.

If you do business in a state where a state agency, rather than Federal OSHA, enforces the OSH Act (such as Tennessee, South Carolina, North Carolina, California, or any of the 22 State Plans covering both private sector and state and local government workers, or the seven State Plans covering only state and local government workers), civil penalty amounts may differ. In North Carolina, for example as discussed here, employers may be surprised to learn that North Carolina OSHA's maximum penalties more than doubled on October 1, 2022 — and these penalties will now increase every January to match the maximum penalties available to Federal OSHA discussed above.

Do Your Job Descriptions Need an Update for 2023?

Each week, FP Weekly members receive a practical and cutting-edge checklist of issues to consider, action steps to take, and goals to accomplish to ensure you remain on the top of your game when it comes to workplace relations and employment law compliance. This week we provide you a checklist of items to consider when updating your job descriptions – which can be the cornerstone of an effective compliance program and help you minimize litigation risks. There's no better time to take a fresh look than the start of the new year.

Why Are Up-to-Date Job Descriptions So Important?

Employers may overlook the importance of maintaining accurate and current job descriptions. After all, with so many other organizational goals and objectives, who has time to review potentially dozens of employee records (or even more)? Employees know what their job duties are, right? Maybe.

Job duties change over time or shift from one position to another during both formal and informal reorganizations, and the skills and experience required for positions evolve. For example, many positions that were once performed full-time in an office might now be partially or entirely performed remotely. Additionally, many employers have moved away from the requirement of a college degree for certain positions — so that might need to be updated, too. Do your job descriptions reflect these types of changes?

Your Guiding Light During Performance Evaluations

Job descriptions can be a cornerstone of performance evaluations and improvement plans. They should reflect the responsibilities, duties, and roles that employees are expected to perform in an organization. It is helpful to be able to point to and rely on the responsibilities and duties identified in a job description when administering performance reviews.

This is also true when an employee's performance falls below the employer's well-stated standards in the job description. A detailed and clearly communicated job description can help eliminate any surprise to an employee at evaluation time – or during disciplinary meetings.

Which Laws Should You Keep in Mind?

Job descriptions can be used for various practical and legal reasons, too. Out-of-date, vague, and inaccurate job descriptions may not only be useless but can also open an employer up to legal liability — which makes it essential that you review your job descriptions with the following laws and internal procedures in mind:

- Fair Labor Standards Act (FLSA): Job descriptions can support or contradict an employer's classification of an employee as exempt or nonexempt. Although job descriptions alone cannot prove that an employee was properly classified as exempt, a well-crafted job description can be helpful evidence to demonstrate the exempt nature of a position. For example, to support classification under the FLSA's executive exemption, employers should ensure that the job description accurately lists relevant job duties, such as whether the employee interviews, selects, and train employees; directs the work of employees; disciplines employees; determines techniques to be used; or plans and controls the budget (among other exempt duties).
- Americans with Disabilities Act (ADA): Job descriptions that detail the essential functions of a particular job aid an employer's analysis of whether an employee can perform the essential functions of their job with or without a reasonable accommodation. Employers will often include a copy with a medical questionnaire and ask a health care provider to review and consider it in determining what, if any, reasonable accommodation the employee may need. Without an accurate and current job description, a healthcare provider's answers may not be correctly formulated, and the reasonable accommodation analysis may be faulty – exposing employers to liability.
- Family Medical Leave Act (FMLA): In certain circumstances, employers may require a fitness-for-duty certification from an employee's health care provider before they can return to work following a leave of absence. The FMLA requires an employer to include a job description and/or list of essential functions of the employee's position with the certification. Again, inaccurate and out-of-date job descriptions could result in a wrong or faulty conclusion by the healthcare provider and the employer.
- Title VII of the Civil Rights Act: Title VII prohibits employers from discriminating against an employee or applicant because of various protected characteristics, such as race, national origin, gender, religion, and sexual orientation. However, it does not require an employer to hire or promote someone who does not meet the qualification standards of the position. Using a job description when making employment decisions can be helpful in defending claims of discrimination and unequal treatment.
- Equal Pay Laws: In addition, job descriptions may support an employer's compensation structure. Well-written job descriptions can demonstrate which jobs are similar and therefore are entitled to similar pay. They can also show which jobs require different levels of qualification and responsibility and therefore are supportive of different pay.

Questions to Consider: Your Job Description Checklist

Consider the following questions to ensure your job descriptions are still accurate:

______ Do your job titles reflect the actual work being done?

______ Do your job descriptions discuss an overview of the company and how the position fits into your overall mission?

______ Do they provide an overview of the key responsibilities the position entails?

______ Do they lay out the required skills and qualification for the position in detail?

______ Beyond that, do they include *preferred* skills and qualifications?

______ Do your job descriptions include the effective date for the document if you later need to prove the historical context?

______ Do your job descriptions state whether the position is exempt or nonexempt?

______ If the position is exempt, does the job description include the duties that show the position falls into the applicable exemption?

______ Do your job descriptions include the essential functions of the position?

______ Does it make sense to identify duties and responsibilities as a percentage of the work to be performed?

______ Are you tying job descriptions to employees' performance evaluations and improvement plans?

______ When was the last time the job description was reviewed?

______ Do you have a system in place to identify when — and which — job descriptions should be reviewed?

______ Are all job descriptions reviewed on a set schedule?

______ Do you perform spot audits if you are unable to review job descriptions on a set schedule?

______ Do you review job descriptions when you post an opening?

Conclusion

Vague and inaccurate job descriptions can cause problems for employers, whereas current and accurate descriptions help support hiring, discipline, promotion, compensation, and termination decisions. Additionally, well written job descriptions can be important evidence of ADA, FMLA, and FLSA compliance.

Frequently Asked Questions About the FTC's Proposal to Ban Non-Compete Agreements

When the federal government proposed a rule that would ban most non-competition agreements, many employers lined up with questions and concerns about the scope of the proposal and what it might mean for their day-to-day businesses. After all, non-competes have become a commonplace strategy for businesses of all types and sizes, and this rule would not only prevent employers from entering into new non-competes but would also require them to rescind those currently in place. The good news: we're here to help. This Insight presents a series of frequently asked questions about all aspects of the proposal as developed by leaders of our Employee Defection and Trade Secrets Practice Group and will be updated as new developments occur in the coming months.

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Big-Picture Overview

What happened?

The Federal Trade Commission (FTC) issued a proposed rule on January 5, 2023 that would prohibit employers from using non-compete clauses with workers.

What does the proposed rule do?

The proposed rule, if adopted in its current form, would require employers to:

- rescind all existing non-competes no later than the rule's compliance date (which is not yet determined); and
- provide notice to current and former workers that the workers' non-compete clauses are no longer in effect. The proposed rule provides model language employers can use to satisfy this notice obligation.

How does the agency define "non-compete" clauses?

The proposed rule defines "non-compete clause" to mean a contractual term that blocks a worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the worker's employment ends.

Why did the FTC do this?

In July 2021, President Biden issued an Executive Order titled "Promoting Competition in the American Economy." It directed the FTC to exercise its "statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

More than a year later, the agency followed through on the president's request. With the release of the proposed rule, FTC Chair Lina Khan opined that non-compete clauses "block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand." The agency further stated that it believes non-compete clauses negatively affect competition in labor markets by suppressing wages and labor mobility, and by preventing new businesses from forming, stifling entrepreneurship, and preventing novel innovation that might otherwise occur if workers were not restricted from sharing their ideas. The FTC estimates that the proposed rule would increase workers' earnings in the U.S. by between $250 and $296 billion per year, and that the ban will close racial and gender gaps by 3.6 and 9.1%.

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Specific Ins and Outs of the Rule

Would the proposed rule prohibit non-solicitation, non-recruit, or confidentiality clauses?

Generally speaking, no. However, employers will need to proceed with caution with restrictive covenants such as customer non-solicitation, employee non-recruit, or confidentiality provisions. While the rule's definition of a "non-compete clause" does not mention other types of covenants, and the FTC's main concern is focused on clauses that prevent a worker from seeking or accepting employment with another person or entity or starting their own business after the conclusion of the worker's employment with the employer, there could be trouble ahead. That's because the FTC has made clear that the title of any given clause is not outcome determinative. Just because a clause is called, for example, "a non-disclosure" clause, it may still violate the proposed rule if its scope and burden is so broad as to be the functional equivalent of a non-compete clause. To that end, the agency will use a "functionality test" to make this determination.

What is the functionality test?

The title of a contractual provision will not dictate whether it is a non-compete clause. If a covenant is so broad that it serves as a *de facto* non-compete, it would not be permitted under the proposed rule.

For example, a non-disclosure provision prohibiting use or disclosure of confidential information is generally fine, but it would become problematic if "confidential information" is defined too broadly. A recent case in the securities industry involved a non-disclosure clause that prohibited use or disclosure of any information concerning the securities industry. That clause was deemed by a court to be a *de facto* non-compete that precluded employment with a competitor. The FTC cited this case as an example of a non-disclosure provision that would be a *de facto* non-compete.

What are the potential penalties for violations of the proposed rule?

The FTC has the authority to issue a complaint in situations where it believes its rules have been violated. If a respondent contests the charges, the complaint is adjudicated before an administrative law judge (ALJ) in a trial-type proceeding. Upon conclusion of the proceeding, the ALJ issues an "initial decision" setting forth findings of fact and conclusions of law and a recommendation for either a "cease and desist" order or dismissal of the complaint. The FTC and the respondent may appeal the initial decision to the full Commission. After the Commission issues a final decision, the matter may be appealed in court.

After a cease-and-desist order is finalized, the Commission may seek an array of remedies in court including civil penalties, restitution, damages, injunctive relief, orders of rescission or reformation of contracts. The FTC may also make referrals to the U.S. Department of Justice for criminal prosecution.

Will the proposed rule be retroactive?

Yes, the rule would invalidate prior non-compete clauses. In addition to prohibiting the future use of non-competes, the proposed rule would prohibit employers from “maintaining” non-competes with workers. It would require employers to rescind such clauses and notify workers they are no longer bound by them.

Would the retroactive provision of the proposed rule invalidate an entire existing agreement containing a non-compete clause, or just the non-compete clause itself, leaving other restrictive covenants intact?

Only the non-compete clause would be impacted by the proposed rule. The model language for notification to workers of rescission contained in the proposed rule includes the following: “The FTC’s new rule does not affect any other terms of your employment contract.”

Could we face retroactive liability for existing agreements?

Employers should not face retroactive liability for use of a non-compete clause prior to enactment of the rule. The proposed rule states that an employer can comply with the rule by rescinding prior non-compete clauses no later than the compliance date, which would be 180 days after the date of publication of the final rule.

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Scope of Rule

Does the proposed rule preclude all non-competes?

The proposed rule would not apply to a non-compete clause entered into in a sale-of-business context. This includes agreements between a person selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or someone who is selling all or substantially all of a business entity's operating assets. This exception only applies when the person restricted by the non-compete clause is a substantial owner of, or a substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause.

The terms "substantial owner," "substantial member," and "substantial partner" are defined to mean an owner, member, or partner holding at least a 25% ownership interest in a business entity. The FTC's Notice of proposed rulemaking (NPRM) notes that after the 60-day comment period, the FTC may elect to change the percentage of ownership interest for purposes of these definitions to a smaller or larger percentage, "for example, 50% or 10%."

Does the proposed rule preclude non-competes with independent contractors?

Yes, the proposed rule would apply to independent contractors, as well as anyone who works for a business, whether paid or unpaid.

My state has a statute that allows non-competes. What effect would the proposed rule have on state law?

The proposed rule states that it supersedes any inconsistent state statute, regulation, order, or interpretation. State statutes, regulations, orders, or interpretations that afford greater protection to workers would be allowed. For example, a state law prohibiting non-competes and non-solicitation provisions would be permissible; a state law allowing non-competes would not.

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Next Steps: Rulemaking, Legal Challenges, and Predictions

Does the FTC have the authority to do this?

Since the proposed rule was issued, many have questioned the FTC's authority. The first to do so was the sole Republican Commissioner on the FTC, Christine Wilson. In her words:

“The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in “unfair methods of competition” rulemaking, (2) the major questions doctrine addressed in West Virginia v. EPA applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals. In short, today’s proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail.”

Will the content of the proposed rule change? What alternatives to a complete ban on non-competes are being considered by the FTC?

The NPRM states that the FTC is considering alternatives to a complete ban on non-competes despite the fact that the agency has preliminarily concluded that a uniform ban on non-competes would best advance the proposed rule’s objectives and would better ensure that workers are aware of their rights.

These alternatives focus on what the FTC describes as two key dimensions of alternatives related to the proposed rule’s final design:

- instead of a categorical ban on non-competes, the FTC could adopt a rebuttable presumption of unlawfulness pursuant to which it would be presumptively unlawful for an employer to use a non-compete clause, but the use of a non-compete clause would be permitted if the employer could meet a certain evidentiary burden, based on a standard that would be articulated in the Rule; and
- instead of applying to all workers uniformly, the Rule could include exemptions or different standards for different categories of workers, which could be based on a worker’s job functions, occupations, earnings, another factor, or some combination of factors.

The NPRM also seeks comment on whether the FTC should adopt disclosure requirements in lieu of a full ban on non-competes, requiring employers to disclose non-competes prior to making an employment offer. It also wants to explore the idea of requiring employers to explain the terms of the non-compete and how the worker would be affected by the signing of the non-compete.

The NPRM additionally seeks comment on whether the FTC should require employers to report certain information to the FTC relating to their use of non-competes in lieu of a complete ban. This could include requiring employers that use non-compete clauses to submit a copy of the clause to the FTC, in order to facilitate the agency's monitoring of the use of such clauses and to discourage employers from using non-compete clauses where not justified under existing law.

When will the proposed rule become effective?

There will be a 60-day notice and comment period during which the public can provide input concerning the proposed rule. This time period could be extended past the current due date of March 20, 2023.

After the comment period closes, the FTC could move to finalize the rule or adopt alternatives. It's anybody's guess how long that could take.

Even if enacted as is, once finalized, the rule would not become effective until 60 days after publication of the final rule in the Federal Register. In addition, there would be a 180-day compliance period (running from the date of publication) during which employers would be allowed to work towards compliance.

How can I submit input during the 60-day comment period?

You can file comments online or in written form. The FTC will consider only those comments received by March 20, 2023.

- For written comments: Write "Non-Compete Clause Rulemaking, Matter No. P201200" on your comment; this also should be written on the envelope if you file your comment on paper. Paper comments should be mailed to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex C), Washington, DC 20580.
- Online submissions may be filed on the federal government's website.

All comments will be placed on a publicly accessible website. For this reason, you should ensure that your comment does not include any sensitive or confidential information.

Will the proposed rule pass?

The proposed rule is likely to pass in some shape or form. It is a culmination of many efforts dating back at least to the FTC's January 2020 workshop on non-compete clauses, which the FTC mentions multiple times in its NPRM. It also has behind it the weight of President Biden's July 2021 Executive Order on Promoting Competition in the American Economy.

Christine Wilson, the sole FTC Commissioner opposed to the rule, seems to believe the rule will pass. In her dissenting statement, she strongly encourages the submission of comments from "all interested stakeholders," noting "this is likely the only opportunity for public input before the Commission issues a final rule." As noted above, after outlining the proposed rule, the NPRM proceeds to invite comment on certain alternatives. All of the signs indicate the Commission fully intends to pass a rule in some shape or form.

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Practical Gameplan for Employers

Assuming the proposed rule becomes effective, what can I do to protect my trade secrets, confidential information, and customer relationships?

As noted above, the proposed rule does not expressly ban non-disclosure and non-solicitation provisions. However, it will apply a functionality test that could invalidate such provisions if they are found to be *de facto* non-compete provisions. Carefully drafted non-solicitation, confidentiality and non-disclosure clauses should withstand such scrutiny, enabling employers to protect confidential information and customer relationships, as well as the poaching of employees by other employees. Additionally, employers could still rely on the federal Defend Trade Secrets Act and state trade secret statutes to protect trade secret information.

Employers should make sure they utilize appropriate policies, procedures and training regarding the handling and use of confidential and trade secret information.

What should we do now?

As the proposed rule is still in the 60-day comment period, and employers would have 180 days after the date of publication of any final rule to comply, not much immediate action is required. It is far from clear what the final rule, if any, will look like, and whether it will survive legal challenge. However, there are some preliminary steps you can consider to put yourself in the best position should the final rule take effect later this year:

- Revisit your restrictive covenants — including non-solicitation and confidentiality provisions — to ensure they are reasonably tailored to protect your legitimate interests. The day before it issued the NPRM, the FTC announced three consent orders forcing three employers to drop their non-competes against thousands of workers. Sounding a lot like the analysis in the NPRM, the consent orders found that the employers use of non-competes was a method of unfair competition, and it required them to terminate the agreements and notify the employees who signed them. While the proposed rule is pending, there is no reason to believe the FTC will relent on its investigative and enforcement efforts.
- You should ask whether the non-competes your company uses are necessary to protect your legitimate interests. You should also consider whether you can protect your interests with a less burdensome covenant such as a properly tailored customer non-solicitation or confidentiality provision.
- Speak up and file a comment if you have something to say. Support your comment with data when possible, but be careful not to disclose confidential information.
- Get your trade secrets house in order. This is perhaps more important now than ever. The FTC cites the availability of trade secret protection as a factor that mitigates the harm of abrogating non-competes. You should identify your trade secrets and put proper policies and procedures in place. Limit trade secret access only to those who need it; train employees how to handle trade secrets and protect against theft; and implement suitable technological controls.

Top 10 Ways Employers Can Avoid Regular Rate Wage Mistakes On Their 2023 Resolutions Lists

When the US Department of Labor's Wage and Hour Division published a Final Rule on the regular rate in late 2019, it gave employers the freedom to more easily offer perks and benefits to their employees without running afoul of federal wage and hour law. But while the Rule did clarify some issues, it left many employers' questions unanswered. And this uncertainty has led to compliance challenges which have lingered to this day. In 2022 alone, in fact, the DOL published more than 25 press releases tied to regular rate violations that it investigated or litigated. As the New Year approaches and you plan your resolutions, we wanted to provide a top 10 list of steps you should consider taking to avoid the most common regular rate missteps.

What is the Regular Rate?

To begin any discussion regarding the regular rate, it is important to remember the basic wage and hour obligations under the FLSA.

- First, employers must pay non-exempt employees at least the minimum wage for all hours worked.
- Second, employees must be paid overtime for each hour worked over 40 in a workweek, and overtime must be paid at one and a half times the "regular rate of pay."

Generally, most states' regular rate analysis is similar to that of the FLSA. However, many are silent on the issue and a few have slightly different rules. Employers must remember to verify the state law where they have employees. Whatever methodology provides the most benefit to the employee – state or federal – is the one the employers should follow.

What Does the Regular Rate Include?

The regular rate is based on "all remuneration" earned from employment with the exception of eight specific exclusions contained in section 7(e) of the FLSA. It sometimes comes as a surprise that the regular rate is not simply an employee’s hourly rate of pay or their take home pay.

The regular rate includes all types of compensation – including things like non-discretionary bonuses, commissions, payments for undesirable shifts or duties, and some non-cash payments depending on the circumstances.

The exclusions contained in section 7(e) are exhaustive. DOL makes that determination on a case-by-case basis, applying the requirements set out in the statute to the specific circumstances, so there are few bright-line rules. The agency cautions that wage supplement payments are still considered compensation for purposes of the regular rate even if they are not tied to hours worked or employee performance. Ultimately, if it looks like a wage, it likely is, and it should be included in the regular rate.

How Do You Calculate the Regular Rate?

The formula for determining the regular rate under the FLSA is total earnings in a workweek (less excludable payments) divided by the total number of hours worked in the workweek.

The regular rate must be equal to or greater than at least the applicable minimum wage – state or federal – whichever is higher. If the regular rate happens to be higher than the applicable minimum wage, the higher rate must be used to calculate overtime. If an employee’s regular rate is less than the applicable minimum wage, then the employee’s straight-time earnings must be adjusted upward to conform with the respective minimum wage requirement and the employee must be paid overtime on the basis of one and one-half times that amount.

For example, if an employee’s regular rate falls below $7.25 per hour, the employee’s pay will need to be adjusted so that the regular rate is at least $7.25 per hour, and the employee’s overtime will be determined at time and one-half of $7.25 (*i.e.*, $10.88 per overtime hour).

A simple example dealing with hourly wages only and no additional compensation is below:

- Jan works 45 hours in a workweek
- Jan’s hourly wage rate is $15 per hour
- 45 hours X $15 per hour = $675 total earnings
- Regular rate = $15 per hour ($675 / 45 hours)

- Overtime premium = $37.50 ($15 per hour regular rate X .5 overtime premium X 5 overtime hours)
- Total compensation due = $712.50 ($675 + $37.50)

The regular rate in this example is the normal hourly wage paid to the employee. However, if that same employee also receives a $100 non-discretionary production bonus that week, the regular rate is no longer $15 per hour.

- 45 hours worked x $15 per hour = $675 total earnings
- $100 production bonus
- Total Remuneration = $775 ($675 + $100)
- Regular rate = $17.22 per hour ($775 / 45 hours)
- Overtime premium = $43.05 ($17.22 per hour regular rate X .5 overtime premium X 5 overtime hours)
- Total compensation due = $818.05 ($775 + $43.05)

A difference of $2.22 per hour between the $15 per hour regular rate and the $17.22 per hour regular rate may not seem significant. But a mistake on this calculation for a large number of employees, over a two-to-three-year period, can quickly become hundreds of thousands of dollars in liability, if not millions.

To make matters worse, if you consider the potential for collective actions with attorneys' fees, or DOL investigations where liquidated damages may be awarded in addition to back wages, getting the regular rate right is essential.

How does the Regular Rate Work for a Tipped Employee?

One of the most common questions employers have is how to calculate the regular rate for tipped employees. The regular rate for tipped employees is the amount of their direct cash wage and the amount of any tip credit an employer may be taking.

For example, under the FLSA, the regular rate for a tipped employee is generally $7.25 per hour, the full current minimum wage. Of course, if a state's minimum wage is higher, then the regular rate for the tipped employee will be higher. Importantly, though, tips over the allowable tip credit amount do not increase the regular rate for overtime purposes.

Returning to Jan as our example, in her role as a tipped server in a restaurant, she works 50 hours in a workweek and is paid a direct cash wage of $2.13 per hour and a tip credit of $5.12 per hour.

Straight Time Pay

- Direct cash wages = $106.50 ($2.13 per hour direct cash wage x 50 hours)
- Tips received from customers = $256 ($5.12 per hour tip credit x 50 hours)

Total Pay Including Overtime Premium Due

- $7.25 per hour (full federal minimum wage) x .5 overtime premium x 10 overtime hours = $36.25 overtime premium due
- Total direct pay owed = $142.75 ($106.50 + $36.25)
- Total compensation due = $398.75 ($142.75 direct pay + $256 tips)

How do End-of-the-Month/Quarter/Year Payments Factor into the Regular Rate?

It is important to understand that the regular rate can change after an employee has already been properly paid for a workweek that has been completed. This often comes up when employees receive commissions and non-discretionary bonuses that impact workweeks that occurred earlier in the year.

As a general rule, to compute the additional overtime that might be due, payments that are paid at the conclusion of a certain period of time (*i.e.*, end of the month, quarter, or year) must be apportioned back over the workweeks during which they were earned. This is sometimes referred to as a "look-back" calculation.

- Jan's hourly rate is $15 per hour
- Jan receives a non-discretionary bonus of $200 at the end of the month for reaching certain goals during that time period
- During the month, Jan worked the following hours:
    - Week 1 – 40
    - Week 2 – 42
    - Week 3 – 40

- Week 4 – 45

Jan's Look-Back Calculation

To calculate the total additional overtime due related to the bonus, consider the following:

- 167 hours worked at $15 per hour = $2,505
- $200 month-end bonus
- Total Remuneration = $2,705 ($2,505 + $200)
- Regular rate = $16.20 ($2,705/167)
- Overtime premium = $56.70 ($16.20 per hour regular rate x .5 overtime premium x 7 overtime hours)
- Total compensation due = $2,761.70 ($2,705 + $56.70)

This bonus payment increased the bonus overtime due by $4.70 ($56.70 - $52). The $52 was the overtime that would have already been paid ($15.00 per hour base rate x .5 x 7 overtime hours). When the $200 month-end bonus is paid, the employed needs to pay an addition $4.70 in overtime. It is important to show this overtime payment as a separate line item on the pay stub so that the DOL and plaintiffs' attorneys can easily see the overtime was properly paid on the bonus.

What if an Employee is Paid at Two or More Rates of Pay?

Another potential area for confusion is when an employee works at two or more different rates of pay during the workweek. Generally, under the FLSA, employers will need to use the "Weighted Average Method" to calculate the proper regular rate. That method is calculated by taking the total compensation earned during the workweek and dividing it by the total hours of work performed during the workweek.

- Jan works a total of 50 hours, consisting of 40 hours at her ordinary rate of pay of $25 per hour, and 10 hours at the travel rate of pay of $15 per hour.
- The weighted average would be calculated as follows:
- $25 per hour x 40 hours = $1,000
- $15 per hour travel rate x 10 hours = $150
- Jan's total hourly pay = $1,150

- Weighted average rate of pay = $23 per hour ($1,150 / 50 total hours)
- Overtime premium = $115 ($23 per hour x 0.5 x 10 overtime hours)
- Total compensation = $1,265 ($1,150 hourly pay + $115 overtime pay)

There's More Math? Are There Any Shortcuts?

We know…all of these calculations are confusing. But help is here. The DOL has published a coefficient table that can be used to easily compute the FLSA half time premium due.

Another Shortcut – the Percentage Bonus Option

Still looking for another way to pay the bonus without all these calculations? The percentage bonus may be the option. You can avoid the calculations by designing a bonus payment which is computed as a predetermined percentage of an employee's total straight-time and overtime pay for the period over which the bonus was earned. If the overtime pay is not included, this option will not work.

For example, a plan could provide that employees who hit a certain production goal in four-week period will receive 2% of their total straight time and overtime wages for that period.

Critically, percentages must be predetermined and cannot be subsequently vary downward or upward in response to increases or decreases in hours worked. The plan also may not produce a fixed or set bonus sum which does not vary as the employee's overtime hours and pay fluctuate. So, for example, it would not be acceptable for an employer to decide at the end of a bonus period to back into a percentage that equals the sum the employer wanted to pay. This would not be a predetermined percentage and would run afoul of the law.

Regular Rate Exclusions

While it is important to understand what is included in the regular rate, it is equally important for employers to understand what is excluded from the regular rate. Section 7(e) of the FLSA contains eight categories of pay that may be excluded from the regular rate.

7(e)(1) – Some Gifts

Sums paid as gifts; payments in the nature of gifts given during holidays or on other special occasions, or as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.

These gifts cannot be promised (or contractually owed), and they cannot be so substantial that an employee would consider it a wage and not a gift. If the gift is paid at a holiday, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm. This is so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency.

7(e)(2) – Vacation, Holiday, and Similar Pay When No Time is Worked – and Reimbursements

Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause.

Payments in this category should not be confused with attendance incentive programs, which must typically be included in the regular rate. Legitimate Paid Time Off (PTO) buyback programs may be excluded from the regular rate calculation if they correspond to what an employee would have been paid if they used their PTO. It may not be used to disguise a bonus, however. For example, a buyback program that pays employees three times the value of the PTO is likely not going to pass the “straight face” test and will need to be included in the regular rate.

Paid meal breaks may also fall into this category of exclusions. The pay for bona fide meal breaks may be excluded from the regular rate, unless an agreement or established practice indicates that the employee and employer have treated the time as hours worked. In that case, the payments must be included in the regular rate.

Similarly, reasonable payments for travel expenses, or other expenses incurred while an employee furthers the employer’s interests and that are properly reimbursable by the employer or other similar payments that are not made as compensation for an employee’s hours of employment may be excludable. Although not a bright line rule, DOL generally considers an expense to be per se reasonable if it is at or below maximum amounts permitted for the same type of expenses under the Federal Travel Regulation or within the reimbursement amounts set forth by the IRS.

7(e)(3) – Discretionary Bonuses, Profit Sharing, and Talent Fees

Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees … paid to performers, including announcers, on radio and television programs

To be considered discretionary, three requirements must be met:

- The employer has sole discretion whether or not to pay;
- The employer has sole discretion to determine the amount of the bonus; AND
- The payment is not made pursuant to a contract, agreement or promise causing employee to expect the payment

Keep in mind that most bonuses are <u>not</u> discretionary and must be included in the regular rate. Commonly employers will have a bonus that is based on a formula that is announced ahead of time and designed to incentivize certain behavior. Such a bonus is not discretionary.

Importantly, labels do not matter. Simply calling a bonus "discretionary" does not determine whether it must be included in the regular rate. For example, calling the formula-based bonus discussed above "discretionary" does not make it discretionary for purposes of the regular rate. In contrast, a $50 spot bonus for completing an unexpected rush order may be discretionary and excludable from the regular rate.

Questions surrounding sign-on bonuses persist. To be excludable, employers must ensure that they are not subject to any claw-back provision requiring the employee to stay with the company for a certain amount of time before payment and that there is no written plan or collective bargaining agreement promising such payment.

7(e)(4) – Employer Contributions to Retirement and Other Plans

Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.

Under this exclusion, things like employer contributions to 401K accounts, unemployment, disability plans, and defined benefit pension plans are not part of the regular rate. The contributions must be made in accordance with a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. These plans may be either company-financed or plans where the employer and employees contribute. If the plan does not meet specific criteria to be considered “bona fide,” the employer contributions will be viewed as a bonus, which must be apportioned back over the workweeks of the period during which it may be said to have accrued.

7(e)(5) – Premium Rate for Certain Hours

Extra compensation paid at a “premium rate” for certain hours worked by an employee because such hours are hours worked in excess of eight in a day, or in excess of 40 hours in the week, or in excess of the employee’s normal working hours or regular working hours, as the case may be.

This focuses on work hours that are more than eight in a day, or more than 40 in a week, or more than the normal day or week, as typically set by policy or agreement. While this can be an unwritten understanding or practice, it is always advisable to communicate these types of payments to employees in writing. These payments are one of the three types of pay that may be credited towards overtime.

7(e)(6) – Premium Rate for Certain Days

Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days.

The key difference from (e)(5) is that this is not focused on hours in a day or a workweek. Rather, it is focused on work performed on weekends or normal days of rest. Where paid properly, the regulation permits this payment to act as a credit towards the statutory overtime that is due to an employee. If the payment is less than time and one-half, it may not be credited towards overtime unless it qualifies as an overtime premium under 7(e)(5).

7(e)(7) – Premium Rate by Contract or CBA

Extra compensation provided by a “premium rate” under an employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding 40 hours).

This exclusion requires a written contract or collective bargaining agreement, and it also requires that the premium rate by paid at a rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during the workday or workweek. Payments properly made under this exclusion may also be credited towards overtime due.

7(e)(8) – Stock Options and Similar Rights

Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program meeting certain criteria may be excluded from the regular rate.

How to Keep Your New Years’ Regular Rate Resolution? Your Top 10 List

Employers must remember that DOL construes the regular rate exclusions narrowly in favor of employees, so making sure that each criteria for each statutory exclusion is satisfied is critical. Here are the top 10 ways you can keep your regular rate resolution in 2023:

1. Ensure the regular rate of pay is used for <u>all</u> overtime calculations

2. Confirm that all earnings are included in the calculations unless the earnings clearly meet one of the above exclusions
3. Be sure to prorate non-discretionary bonuses and commissions over the appropriate time period in which they were earned – conduct your look-back calculations
4. Review policies and practices related to overtime pay and confirm that your real-life practices match your policies
5. Don't forget to check that all rates of pay have been factored into the regular rate
6. For employers who take a tip credit, make sure the regular rate of pay for tipped employees is not calculated on just the direct cash wage
7. Confirm accurate documentation of related timekeeping and payroll records
8. Review bonus plans and commission plans for correct language and descriptions and that payment practices align with these plans (and remember that simply calling a bonus "discretionary" does not make it excludable from the regular rate)
9. Conduct a "self-audit" – preferably through counsel to utilize attorney-client privilege
10. Always check state and local law requirements regarding the regular rate – they may provide greater rights or protections for employees than the FLSA

Expansion of Paid Leave Laws May Alter Federal Contractors' Responsibilities in 2023

A new year often brings about new beginnings – and federal contractors across the country may have to face a new normal in 2023 when it comes to paid leave obligations. Given that federal paid leave proposals proved unsuccessful over the past two years, many state and local lawmakers are moving towards enacting family and medical leave policies of their own. Michigan and Minnesota legislatures appear to be at the forefront of this initiative, but they are by no means the only states that will see movement in this area in 2023 given the political composition of other state legislatures. This means that federal contractors subject to Executive Order 13706 may need a refresher not only on their existing paid leave obligations but on the interplay with state and local leave laws that may alter or expand their responsibilities. Here's what federal contractors need to know as we head into this new era.

What Types of Contracts are Impacted by the Executive Order?

Not all federal contractors are implicated by Executive Order 13706. Generally, if the contractor is also subject to the federal contractor minimum wage regulations (typically through a Davis Bacon Act (DBA) or Service Contract Act (SCA) qualifying contract), they will also be covered by the paid leave obligations. That's because the definition of covered contractor has purposely paralleled those regulations for the paid sick leave rules.

Employers should first confirm whether their government contracts or subcontracts are covered by the SCA or DBA. This will allow you to determine whether you must comply with the Executive Order. (Hint: those federal contractors that had determined they were covered by the Federal Contractor vaccine mandate are likely subject to the Federal Paid Sick Leave (FPSL) requirements.)

What Accrual Options do Contractors Have Under the Executive Order?

The Executive Order requires contractors to provide workers on the qualifying contract(s) with at least 56 hours of FPSL per year. Contractors have the option to “frontload” the leave by providing workers with 56 hours of leave at the beginning of each accrual year, or to “track” accrual by providing workers with one hour of paid sick leave for every 30 hours worked until the 56-hour threshold is met.

What is Covered Under the Executive Order?

Workers may use paid sick leave for a wide variety of purposes: for their own illness or other health care needs, including preventive care; and for the care of a family member or loved one who is ill or needs health care, including preventive care. Paid sick leave expands the definition of “family” to also encompass those persons who have a familial-like relationship with the employee, such as a long-time neighbor or close friend.

Leave goes further than the Family Medical Leave Act (FMLA) by also permitting paid leave for issues related to domestic violence, sexual assault, or stalking where the employee or a family member or loved one is a victim (such as obtaining counseling, seeking relocation, receiving assistance from a victim services organization, or taking legal action).

The standard for whether an illness, injury, or life event is covered under this rule is very broad. The rule specifically states that it could include a wide variety of situations such as the common cold, an upset stomach, a headache, a sprained ankle, and similar maladies – well beyond FMLA-covered serious health conditions.

What About the Family Medical Leave Act?

A contractor’s obligations under the Executive Order have no effect on its obligations to comply with, or ability to act pursuant to, the FMLA.

What is the Interplay Between the Executive Order, the FMLA, and State or Local Laws?

A contractor’s compliance with a state or local law requiring that workers be provided with paid sick time does not excuse the contractor from compliance with any of its obligations under the Executive Order. A contractor may, however, satisfy its obligations under the Executive Order by providing paid sick time that fulfills the requirements of a state or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds all of the requirements of the Executive Order. Where the requirements of an applicable state or local law and the Executive Order differ, satisfying both will require a contractor to comply with the requirement that is more generous to employees.

Similarly, where the requirements of an applicable state or local law and the federal FMLA differ, satisfying both will require a contactor to comply with the requirement that is more generous to employees.

What Should Contractors Do Now?

If you have existing leave policies in place, you should carefully review them for an understanding on how your workers are provided paid sick time and family and medical leave.

With various state legislatures declaring an intent to enact generous state and/or local family and medical leave laws, one-size-fits-all policies may no longer be viable. You will want to determine whether you have federal contractors working in states where state and/or local laws have been or may be enacted that provide more generous family and medical leave than your existing policies.

For example, Colorado, Oregon, and New York have all made changes that have gone into effect at the beginning of 2023 or will go into effect sometime in 2024:

- Colorado: Colorado FMLA provides up to 12 weeks of paid leave for family, medical, or safe leave. Eligible employees who experience pregnancy or childbirth complications can receive an additional four weeks of paid leave, for a total of 16 weeks of leave. Coverage begins January 1, 2024.
- New York: In 2023, the list of family members for whom eligible workers can take paid family leave to care for will include siblings with a serious health condition. This includes biological siblings, adopted siblings, step-siblings, and half-siblings. These family members can live outside of New York State and even outside of the country. Coverage began January 1, 2023.
- Oregon: Oregon FMLA provides up to 12 weeks of paid leave for family, medical, or safe leave. Eligible employees who experience pregnancy or childbirth complications can receive an additional two weeks of paid leave, for a total of 14 weeks of leave. Coverage begins September 3, 2024.

We anticipate that states such as Minnesota and Michigan, where Democrats are taking control of the legislatures, will take strides to expand state paid family and medical leave as soon as practicable.

California, Connecticut, Hawaii, New Jersey, Rhode Island, and Washington have updated paid family and medical leave premium rates annually. Although the 2023 rates have not yet been announced for these states, employers with employees in these states should keep an eye out for the updated 2023 rates and adjust as necessary.

Conclusion

Given that contractors must comply with the requirement that is more generous to employees, the failure to provide workers with the proper amount of leave may result in penalties and fines under either the Executive Order and state and/or local laws. For this reason, it is imperative that contractors have safeguards in place to monitor worker locations, policy language, and state and local law developments.